Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-1569

ARIZONA PUBLIC SERVICE COMPANY, a corporation,
Appellant,

vs.

THE STATE OF ARIZONA; ERNEST A. GARFIELD, STATE TREASURER OF ARIZONA; STATE TAX COMMISSION OF ARIZONA and WALDO DeWITT, JOHN HAZELETT and ROBERT KENNEDY, MEMBERS OF AND CONSTITUTING STATE TAX COMMISSION OF ARIZONA; APACHE COUNTY; LaVERE O CONNOLLY, TREASURER OF APACHE COUNTY; COCHISE COUNTY; F. C. ALEXANDER, TREASURER OF COCHISE COUNTY, COCONINO COUNTY; ROSE STACY, TREASURER OF COCONINO COUNTY; GILA COUNTY; ROY WOOD, TREASURER OF GILA COUNTY; GRAHAM COUNTY; LOLA HUBBARD, TREASURER OF GRAHAM COUNTY; MARICOPA COUNTY; HAROLD D. LAFFERTY, TREASURER OF MARICOPA COUNTY; MOHAVE COUNTY; RUTH O. MOSER, TREASURER OF MOHAVE COUNTY; NAVAJO COUNTY; RAYMOND H. RANDALL, TREASURER OF NAVAJO COUNTY; PIMA COUNTY; JAMES LEE KIRK, TREASURER OF PIMA COUNTY; PINAL COUNTY; ALICE M. DIFFIN, TREASURER OF PINAL COUNTY; YAVAPAI COUNTY; PAUL J. WEDEPOHL, TREASURER OF YAVAPAI COUNTY; YUMA COUNTY; ROBERT E. LEE, TREASURER OF YUMA COUNTY,
Appellees.

On Appeal From the Supreme Court of the State of Arizona.

JURISDICTIONAL STATEMENT.

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Appellees.

On Appeal From the Supreme Court of the State of Arizona.

JURISDICTIONAL STATEMENT.

Appellant, Arizona Public Service Company ("APS" hereinafter), appeals to the Supreme Court of the United States from the judgment of the Superior

Court of the State of Arizona in and for the County of Maricopa entered March 4, 1976, pursuant to the Mandate of the Court of Appeals of the State of Arizona, after denial of rehearing by the Court of Appeals, denial of review by the Arizona Supreme Court, and denial by the Court of Appeals of a motion by APS to permit amendment of its complaint. This Jurisdictional Statement is submitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

Opinions Below.

The opinion of the Arizona Court of Appeals, Division One, is reported at 24 Ariz.App. 601, 540 P.2d 727 (1975), and is reprinted as Appendix A. Rehearing was denied by the Court of Appeals without opinion (Appendix B). Review by the Arizona Supreme Court was denied without opinion (Appendix C). A motion by APS to permit amendment of its complaint was denied by the Court of Appeals (Appendix D). The Mandate of the Court of Appeals is not reported and is reprinted as Appendix E. The final Superior Court judgment entered pursuant to the Mandate of the Court of Appeals is not reported and is reprinted as Appendix F. The initial decision of the Superior Court which was reversed is reprinted as Appendix H.

Jurisdiction.

This case is one of denial of procedural due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. It draws into question the validity of A.R.S.[1] § 42-204 on the ground that, as construed by Arizona's highest court in this case,

[1]Arizona Revised Statutes Annotated.

the statute is repugnant to the Constitution of the United States, for the reason that the statute, as so construed, denies any access to the courts to APS and to other taxpayers to test the legality of certain ad valorem (property) taxes.

This proceeding is a suit brought by APS under A.R.S. § 42-204.C to recover ad valorem taxes paid under protest on the ground that the taxes were illegally levied. The judgment sought to be reviewed is the final judgment against APS of the Superior Court of the State of Arizona, in and for the County of Maricopa, dated February 23, 1976 and entered March 4, 1976. This judgment was entered pursuant to the Mandate of the Court of Appeals of the State of Arizona, Division One, issued February 9, 1976, after it had denied rehearing on November 7, 1975, after the Arizona Supreme Court had denied review on December 16, 1975, and after the Court of Appeals on January 30, 1976 had denied a motion of APS to permit amendment of its complaint. Notice of Appeal was filed on April 14, 1976 in the Court of Appeals and in the Superior Court, both courts being in possession of portions of the record. The Notices of Appeal are reprinted as Appendix G.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U.S.C. § 1257(2).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Bantam Books v. Sullivan*, 372 U.S. 58 (1963); *Central R.R. of Pennsylvania v. Pennsylvania*, 370 U.S. 607 (1962); *Fiske v. Kansas*, 274 U.S. 380 (1927); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921).

Statutes Involved.

A.R.S. § 42-204, appearing on page 52 of the 1975-1976 Cumulative Pocket Part of Volume 13, Arizona Revised Statutes Annotated, provides:

> "§ 42-204. Payment of tax as prerequisite to testing validity thereof; Injunctive relief prohibited; refunds
>
> "A. Any person upon whom a tax has been imposed or levied under any law relating to taxation shall not be permitted to test the validity or amount thereof, either as plaintiff or defendant, if any of the taxes levied and assessed against the property of appellant are not paid as provided in § 42-342, subsection B, paragraphs 2 and 3, except that in the case of private car companies the taxes shall be paid as provided in § 42-746.
>
> "B. No injunction, writ of mandamus or other extraordinary writ shall issue in any action or proceeding in any court against the state or an officer thereof, or against any county, municipality or officer thereof, to prevent or enjoin the extending upon the tax roll of any assessment made for tax purposes, or the collection of any tax imposed or levied.
>
> "C. After payment of the tax, an action may be maintained to recover any tax illegally collected, and if the tax due is determined to be less than the amount paid, the excess shall be refunded in the manner provided by this title. As amended Laws 1964, Ch. 40, § 1; Laws 1967, Ch. 107, § 9; Laws 1969, Ch. 122, § 4; Laws 1970, Ch. 82, § 5."

A.R.S. § 42-204, as it has been construed by Arizona's highest courts in this case, is alleged to be unconsitutional under the "due process" clause of Section 1 of Amendment Fourteen to the Constitution of the United States which reads:

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law; . . .".

Other statutes related to this appeal are those which set forth the procedure followed in 1970 for establishing the ad valorem tax rate and to assess and levy the tax.[2] The procedure, in brief, was that as to public utilities, such as APS, and as to certain other major taxpayers, the State Department of Property Valuations annually found the full cash value of the taxpayer's taxable property. A.R.S. § 42-124.01. Such a taxpayer, if dissatisfied with the valuation of its property, could appeal to the State Board of Property Tax Appeals. A.R.S. § 42-124.02. Thereafter, if still unsatisfied, it could pay the tax under protest and appeal to the Superior Court. A.R.S. § 42-146. This avenue of appeal was open only where the issue was one of property valuation.

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[2]Procedures outlined are as they existed in 1970. Statute references are to code sections as they appear in the bound Volume 13 of the Arizona Revised Code Annotated or, if amended, in its 1969-1970 Cumulative Pocket Part. In 1973 a Department of Revenue was created at the State level and the statutory tax assessment procedures were considerably revised. Although the changes were substantial, they were largely administrative. None of the changes are significant to this appeal, nor do they resolve, even prospectively, the constitutional issue raised by this appeal.

The State Tax Commission established a property tax rate, following the formula established by A.R.S. § 42-108.01, which, in 1970, read as follows (Arizona Revised Statutes Annotated, 1969-1970 Cumulative Pocket Part, page 12):

> "§ 42-108.01. Annual state and county tax levy
>
> "A. On or before the second Monday of August each year, the state tax commission shall make and enter on its records an estimate of the amount of money to be received during the current fiscal year from each source of revenue other than direct property taxation.
>
> "B. On the second Monday of August each year, the state tax commission shall levy upon the real and personal property within the state such amount of money as is necessary, with all other sources of revenue as estimated by the state tax commission and all unencumbered balances on hand at the close of the preceding fiscal year, as fixed by law, to defray the necessary expenses of the state for the current fiscal year, including interest and principal of the bonds of the state, and shall fix the rate of taxation required to produce the amount of such levy.
>
> "C. Upon the same property and upon the same valuation, the board of supervisors of each county shall levy for the same fiscal year all taxes to be levied and collected for all county purposes in amounts as limited by and for the purposes specified in this article. Added Laws 1967, Ch. 107, § 1."

The formula thus established which the Tax Commission was required to use to set the tax rate for State tax purposes pursuant to A.R.S. § 42-108.01 may be expressed as follows:

$$\text{Rate (in mills per \$1)} = \frac{A-(S+O)}{V}$$

Where

A=Total appropriations, a fixed amount furnished by the State Legislature.

S=Surplus funds available from the prior year, also a fixed amount.

O=Other receipts from sources other than property taxes, such as from privilege and use taxes, "as estimated by the tax commission."

V=Net assessed valuation of all taxable property, also a fixed amount as determined through the assessment procedures.

The property taxes assessed at the rate so determined by the Tax Commission were then, and are now, billed and collected by the County Treasurers, as ex officio tax collectors for the State. A.R.S. § 42-341. The taxes become a lien against the property assessed. A.R.S. § 42-312. If the taxes are not paid before they become delinquent, the tax liens may be foreclosed and the property seized and sold by the County Treasurers. A.R.S. §§ 42-348, 42-381, 42-387, *et seq*.

As mentioned, if APS had questioned the value placed on its property it would have had a right under A.R.S. § 42-124.02 and § 42-146 to contest the valuation by appeal to the Board of Property Tax Appeals and from there to the Superior Court, or it might alternatively have proceeded under A.R.S. § 42-204.

But in this case property values were not in issue. To contest the amount or validity of the tax on any basis other than as to property value APS was required to proceed exclusively under A.R.S. § 42-204.

As this case now stands, APS is procedurally precluded from litigating the merits of the substantive issue of the legality and constitutionality of the tax levy in question. The statutes and the constitutional provisions relied upon by APS in its case on the substantive issue of the legality of the tax therefore are not involved in this appeal, which goes to the issue of procedural due process. They are cited in the unreported initial decision of the Superior Court (Appendix H) which was reversed on the remand of this case.

A.R.S. §§ 42-124.01, 42-124.02 and 42-146 are printed in Appendix I.

Question Presented.

Whether A.R.S. § 42-204, as construed by the Arizona Supreme Court (by its denial of review of the decision of the Court of Appeals), is unconstitutional under the Fourteenth Amendment to the United States Constitution, in that the statute, as so construed, deprives Appellant and other taxpayers of access to any judicial proceeding to test the legality of those ad valorem taxes which, although they may have been illegally imposed, have not been imposed at a rate which is so excessive as to be fraudulent or arbitrary.

Statement of the Case.

The question presented on this appeal arises out of the construction placed on A.R.S. § 42-204 by the Arizona Court of Appeals in a decision which

has been denied review by the Arizona Supreme Court. The effect of the decision, if not reversed, will be to allow the Arizona legislature and all other taxing bodies in Arizona to enact appropriation measures and taxes the legality of which cannot be tested before any Arizona court, even though they may be illegal and in violation of Arizona statutes, the Arizona Constitution, or the Constitution of the United States.

In this case an initial decision in favor of APS on the merits of the case (Appendix H) has been reversed on the ground that APS failed to plead or prove that the action of the Arizona State Tax Commission in making the tax levy in question resulted in "an excessive tax rate so as to be fraudulent or arbitrary." APS believes that reversal on this ground unconstitutionally construed A.R.S. § 42-204. It contends, there has been levied against it a tax which is illegal and unconstitutional, but which it may not test in any judicial proceeding. According to the Arizona Supreme Court, the legality of an ad valorem tax may be tested only if it is alleged and proved *both* that (1) the tax is illegal, *and* (2) the tax is imposed at a rate so excessive as to be fraudulent or arbitrary. Thus a taxpayer is without any remedy whatever to contest taxes, however illegal, which are not also challenged and proved to be so grossly excessive as to be fraudulent or arbitrary.

A category of appropriation and tax legislation has therefore been created which cannot be tested or overturned through any legal action. This is so because A.R.S. § 42-204 establishes the sole remedy to test the legality or constitutionality. Yet the decision below construes A.R.S. § 42-204 to require that if a taxpayer contends that an illegal property tax has been levied against

it, pays the tax under protest and brings suit for a refund under A.R.S. § 42-204, the taxpayer may not recover unless the taxpayer first alleges and proves that, in addition to being illegal, the tax imposed was at "an excessive rate so as to be fraudulent or arbitrary." This, APS contends, cannot be allowed, for it would deprive APS and other taxpayers of access to the courts, and would leave them without remedy to avoid the imposition of illegal taxes, in violation of their right to the procedural due process of law which is guaranteed by the Fourteenth Amendment to the Constitution of the United States.

This case arises out of the enactment in 1970 by the Arizona Legislature in its appropriation bill of two appropriations totaling $32,000,000, a $12,000,000 "Capital Outlay Stabilization Fund" and a $20,000,000 "Operating Reserve." APS contends these were illegal appropriations under certain provisions of the Arizona Constitution, certain Arizona statutes, and the equal protection clause of the Fourteenth Amendment of the United States Constitution.

The amounts appropriated by the Legislature have an automatic direct effect on the ultimate ad valorem (property) tax rate, which is set by the Arizona State Tax Commission[3] by (1) subtracting from total appropriations the amount of any surplus funds from the prior year and the amount of all estimated sources of revenue other than from property taxes and (2) dividing the difference by the total net assessed valuation of all taxable real and personal property. A.R.S. § 42-108.01.B.

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[3]A.R.S. § 42-108.01 was amended in 1973 to transfer the rate-setting function to the Arizona State Department of Revenue, an administrative change without bearing on this appeal.

Because of the inclusion of the $32,000,000 in allegedly illegal appropriations the tax rate was set at $1.65 per $100 of assessed valuation. Had the $32,000,000 not been included the tax rate would have been $.54 per $100 of the assessed valuation. Because of the higher tax rate the property taxes levied against APS were $1,789,894.39 higher for the year 1970 than the taxes would have been had the lower rate been used.

APS paid the $1,789,894.39 in taxes in question under protest and brought timely suit for refund under the authority of A.R.S. § 42-204. With certain limited exceptions, not applicable to this case,[4] payment of a tax under protest and suit for a refund, pursuant to A.R.S. § 42-204, is the only method permitted under Arizona law to test the validity of a tax. *In re Delinquent Tax List of Pima County*, 4 Ariz. 186, 37 P. 370 (1894) (first case), *aff'd*, 164 U.S. 599 (1896); *Arizona Eastern R.R. v. Graham County*, 20 Ariz. 257, 179 P. 959 (1919); *State ex rel. Lane*

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[4]If there is "no semblance of authority" for the imposition of a tax, a taxpayer may invoke the remedy of injunction. *State Tax Commission v. Superior Court*, 104 Ariz. 166, 450 P.2d 103 (1969); *Smotkin v. Peterson*, 73 Ariz. 1, 236 P.2d 743 (1951) or bring an action for declaratory relief, *Warren Trading Post v. State Tax Commission*, 95 Ariz. 110, 387 P.2d 809 (1963), *rev'd* 380 U.S. 685 (1965). "If there is no semblance of authority for the imposition of the tax, then injunction will lie. If there is some semblance of authority for the imposition of such tax, plaintiff's remedy is to pay the tax under protest then test its validity by suing for recovery of the amounts so paid under Section 73-841 [now A.R.S. § 42-204]"; *Santa Fe Trail Transportation v. Bowles*, 62 Ariz. 177, 156 P.2d 722 (1945). As pointed out in the decision of the Court of Appeals (Appendix A) the challenged appropriations carried with them not only a semblance of authority but a presumption of constitutionality. Appellant's only possible remedy therefore was to pay the taxes under protest and sue for refund under A.R.S. § 42-204.

v. Superior Court, 72 Ariz. 388, 236 P.2d 461 (1951); *Maricopa County v. Chatwin*, 17 Ariz.App. 576, 499 P.2d 190 (1972).

The Superior Court decided the case on its merits in favor of APS. The Court of Appeals, however, reversed on the procedural issue and remanded the case with directions to the trial court to enter judgment in favor of the State, without reaching the substantive merits. Rehearing by the Court of Appeals was denied. Review by the Arizona Supreme Court was denied. A motion to the Court of Appeals to permit amendment of the complaint was denied. The Superior Court, as mandated, then entered final judgment in favor of the State.

The opinion of the Court of Appeals (Appendix A), the only written opinion on the procedural issue, thus lies at the heart of this appeal. The Court of Appeals held that the trial court should not have reached the merits but should have dismissed the complaint because APS had not pled and proved, as a necessary preliminary to consideration of the merits, that the resultant tax rate was so excessive as to be fraudulent or arbitrary. The decision of the Court of Appeals was based on its reading of one prior Arizona Supreme Court decision, the "second *Cochise* case," *Cochise County v. Southern Pacific Co.*, 99 Ariz. 385, 409 P.2d 549 (1966), which it deemed a precedent binding upon it, even though it believed the holding and reasoning of that case to be in error, even though there were contrary Arizona decisions both before and

after that case, and even though a three-judge panel in the Federal District Court for the District of Arizona —in a decision which until now has not been questioned or set aside—distinguished that aberrant Arizona case and gave to A.R.S. § 42-204 the same constitutional interpretation as had the other Arizona decisions.

The reasoning of the Court of Appeals is critical and may be summarized as follows:

(1) To the extent the tax rate-setting body, the Tax Commission, acts on a *discretionary* matter, such as it does when estimating revenues anticipated from sources other than property taxes, its judgment may not be attacked unless it is alleged and proved to result in a tax rate so excessive as to be fraudulent or arbitrary.

(2) The *same* test applies where the Tax Commission mechanically and without discretion uses in its computation incorrect amounts furnished to it from another source (in this case the Legislature) whose figures the Commission is required to use, "as is," even though such amounts are incorrect and are illegally or unconstitutionally generated by the other source.

(3) The second premise is neither logical nor legally sound, but it is the principle established by the Arizona Supreme Court in the second *Cochise* case, whose precedent the Court of Appeals must follow until reversed by a higher court.

The Court of Appeals rested its decision entirely on the basis of deeming itself bound by the precedent

set by the second *Cochise* case. As did the trial court, it found no logic in the State's theory of the case that a taxpayer could challenge the legality only of those taxes imposed at a fraudulently or arbitrarily excessive rate.

Since the Arizona Supreme Court chose not to review the decision of the Court of Appeals, it is evident that, unless the United States Supreme Court grants this appeal and reverses, the Arizona Supreme Court, by failing to reverse the decision of the Court of Appeals, has created, by judicial construction of A.R.S. § 42-204, a kind of legislative tax shelter, a broad area within which the Legislature and other State taxing bodies are free to appropriate funds or levy taxes for whatever purpose, however illegal or unconstitutional, so long as they act with a "semblance" of authority and do not appropriate amounts so large, or levy taxes so great, as to result in a tax rate which is "so excessive as to be fraudulent or arbitrary." No taxpayer has a remedy to test a tax which has a semblance of authority (but which is in fact illegal) so long as it is not "excessive." Without remedy, if the taxpayer fails to pay the tax, his property will be liened, seized and sold by the State to fund the illegal appropriation.

APS contends on this appeal that there is no such right to do wrong without remedy, but that such is a denial of procedural due process under the Fourteenth Amendment to the United States Constitution.

How the Federal Question Was Presented.

Inasmuch as the trial court initially reached and decided the case on its merits, no issue of procedural due process arose until the Court of Appeals rendered its opinion reversing and remanding the case on the procedural issue, holding, reluctantly, that it was bound to follow the prior precedent of the Arizona Supreme Court decision in the second *Cochise* case. Accordingly, the issue was first raised in APS's motion for rehearing before the Arizona Court of Appeals, which denied the motion. The Arizona Supreme Court summarily denied APS's petition for review, thereby foreclosing APS from any further opportunity to present or argue the constitutional issue before the Arizona Supreme Court or any other State court.

The Federal Question Is Substantial.

The federal question presented is substantial for the following reasons:

A. The Decision Denies Appellant Due Process of Law in Its Primary Sense.

All constitutional rights of course are fundamental rights. But the threshold right is the right to assert a right. If a person is denied any access whatever to our judicial system to claim the denial of a substantive right, the substantive right is illusory. For such person the substantive right simply does not exist. For this reason there is no constitutional right which this Court should protect more zealously than the right to the procedural due process which has been denied to APS in this case.

B. The Decision Is in Direct Conflict With Clear and Settled Decisions of This Court.

The present decision denies access to the judicial system to any taxpayer who seeks to contest the legality of a tax which is illegal or unconstitutional so long as it has a "semblance" of authority and does not result "in an excessive tax rate so as to be fraudulent or arbitrary." Between these extremes lies a broad spectrum of possible appropriations and tax levies which, though at bottom illegal, would have a superficial semblance of authority and which would result in the imposition of a tax rate which would be either not "excessive" (whatever that subjective term may mean) or would be at a rate which is excessive but not so excessive as to be "arbitrary or fraudulent."

Thus, within this wide and ill-defined middle range of the tax spectrum, the Arizona Supreme Court, by its silence in denying review in this case, has construed A.R.S. § 42-204 to create a constitutional *cordon sanitaire,* a "free zone" within which the State Legislature or other taxing bodies may enact appropriations or levy taxes the legality of which cannot be challenged by any taxpayer before any Arizona court.

Arizona's courts may not so construe A.R.S. § 42-204. Such a construction, which denies the taxpayer the right to litigate the legality of the resultant tax, is a deprivation of procedural due process. In the area of State taxation, such a result is squarely contrary to the holdings of this Court in *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U.S. 673 (1930); *Central*

of Georgia R.R. Co. v. Wright, 207 U.S. 127 (1907); and *Londoner v. Denver,* 210 U.S. 373 (1908). In *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* this Court said:

> "If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the enaction. The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available, and which is not now open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent seizure of its property, the judgment deprives the plaintiff of its property." 281 U.S. at 679.
>
> * * *
>
> "Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." (Cit. omitted). 281 U.S. at 682.

The principle involved has far broader application than to tax cases. The cases above cited are among the seminal decisions on procedural due process which have influenced this Court in its determinations on procedural due process in the area of the right to hearing before seizure of property in *Sniadach v. Family*

Finance Corp., 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); *North Georgia Finishing Co. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), as to the requirement that indigents have access to judicial remedies even though unable to pay filing fees, *Boddie v. Connecticut*, 401 U.S. 371 (1971), and as to overturning irrebutable presumptions which deny litigants the right to try contested facts, *Bell v. Burson*, 402 U.S. 535 (1971); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Vlandis v. Kline*, 412 U.S. 441 (1973); *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974).

C. The Decision Is Contrary to the Construction of A.R.S. § 42-204 by a Federal Court.

In *Southern Pacific Company v. DeWitt*, 288 F. Supp. 570 (D.Ariz. 1968), the District Court for the District of Arizona held that by reason of 28 U.S.C. § 1341[5] the District Court had no jurisdiction to enjoin the assessing of State taxes against the property of a railroad at a rate which the railroad claimed was illegally established under a State statute (A.R.S. § 42-227) which it alleged was unconstitutional. Contrary to the railroad's contention, the District Court held that the railroad *had* a plain, speedy and efficient remedy in the State court under A.R.S. § 42-204. The District Court stated:

> "Any tax which is collected contrary to the provision of the constitutions of Arizona or the United States is an illegally collected tax and is refundable.
>
> * * *

[5]"28 U.S.C.A. § 1341. *Taxes by States.* The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State. June 25, 1948, c. 646, 62 Stat. 932."

> "If the state courts determine that the tax is illegally collected, A.R.S. § 42-204, subsec. C, will be given effect and the illegally collected tax will be refunded." (Cit. omitted). 288 F. Supp. at 589.

In the present case a tax collected by the State is alleged to have been illegally levied, contrary to the provisions of the statutes and Constitution of Arizona and contrary to the Constitution of the United States. Nevertheless, Arizona's highest courts have now construed A.R.S. § 42-204 to permit suit for refund *only* if the tax rate is found to be fraudulently or arbitrarily excessive. Thus, contrary to the construction placed on A.R.S. § 42-204 by the federal court, the Arizona Supreme Court now holds that the statute does not apply to "*any* tax" claimed to be illegal. It holds that there are some illegal taxes as to which a taxpayer not only has no plain, speedy and efficient remedy under A.R.S. § 42-204—the taxpayer has no remedy at all.

The district court's decision was by a three-judge federal panel. The taxpayer was challenging the validity of an Arizona legislative act establishing a new classification of property for tax purposes. The federal court in its decision expressly distinguished, as inapplicable, the holding in the second *Cochise* case, on which the Arizona Court of Appeals wholly based its decision in the present case. It is submitted that the interpretation placed on A.R.S. § 42-204 by the federal court is the constitutional interpretation, and that the interpretation by the Arizona courts in this case is the unconstitutional one.

D. The Decision in Effect Overrules Arizona Supreme Court Decisions Which Constitutionally Construed and Applied A.R.S. § 42-204 Both Before and After the Second Cochise Case.

Until the decision below in this case, the decision of the Arizona Supreme Court in the second *Cochise* case appeared to be an anomaly, a case with no present significance, a case in which the latent constitutional issue had simply not been recognized. The second *Cochise* case had been preceded by cases which had treated A.R.S. § 42-204 to mean exactly what it clearly says, that a taxpayer may test the legality of the tax imposed under "*any* law relating to taxation." (A.R.S. § 42-204.A, emp. sup.)[6] *State Tax Commission v. Shattuck*, 44 Ariz. 379, 38 P.2d 631 (1934); *Smotkin v. Peterson*, 73 Ariz. 1, 236 P.2d 743 (1951).

The second *Cochise* case was *followed* by *Maricopa County v. North Phoenix Baptist Church*, 2 Ariz. App. 418, 409 P.2d 577 (decided January 10, 1966, rehearing denied by the Arizona Supreme Court February 23, 1966, 42 days after the decision in the second *Cochise* case). In this case a church, claiming its property to be exempt, was held to have properly brought an action under A.R.S. §42-204 for a tax refund. It was not required to allege or prove that the tax rate was grossly excessive. Also decided after the second *Cochise* case was the federal case of *Southern Pacific Company v. De Witt*, 288 F.Supp. 570 (D.Ariz.

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[6]It should also be noted that in an "illegality" case A.R.S. § 42-204.C gives the taxpayer an absolute right to recover the full amount of *any* tax illegally collected, whereas, in an "amount" case, such as over the issue of the correct valuation of, say, an office building, the remedy given is that the taxpayer is to be refunded the amount of any "excess" tax found to have been collected.

1968), above discussed, and the case of *Maricopa County v. Chatwin*, 17 Ariz.App. 576, 499 P.2d 190 (1972). Both cases treated A.R.S. § 42-204, as permitting a taxpayer to test *any* tax through the procedure authorized by A.R.S. § 42-204.

A.R.S. § 42-204 is not unconstitutional on its face. It was not unconstitutionally construed by the Arizona Supreme Court, either before or after the second *Cochise* decision, under the main line of Arizona cases including *Shattuck*, *Smotkin*, and *North Phoenix Baptist Church*. It was not given an unconstitutional reading in *DeWitt* or in *Chatwin*, both of which treated the main line of Arizona Supreme Court authority as the viable line.[7]

By this case, however, the tables have been turned. The Arizona Supreme Court has reverted to an unconstitutional interpretation of A.R.S. § 42-204, exhuming the second *Cochise* case—its constitutional skeleton in the closet—and thereby overturning all prior Arizona decisions which give the statute a constitutional construction. The United States Supreme Court should reverse this case in order to reinter the second *Cochise* case and to return Arizona's courts to the constitutional interpretation of A.R.S. § 42-204 which heretofore they have given the statute in all cases except the second *Cochise* case and this case.

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[7]These Arizona cases, and the federal *DeWitt* case, which give A.R.S. § 42-204 a constitutional interpretation, also respected (as the present case and the second *Cochise* case did not) the fundamental precept of statutory construction that tax laws are to be strictly construed against the state and in favor of the taxpayer. *White v. Aronson*, 302 U.S. 16 (1937); *City of Phoenix v. Borden Company*, 84 Ariz. 250, 326 P.2d 841 (1958); *State Tax Commission v. Miami Copper Co.*, 74 Ariz. 234, 246 P.2d 871 (1952); 3 Sutherland, *Statutes and Statutory Construction* § 66.01, at 179 (4th Ed. 1974).

E. The Decision Permits the State Legislature and Other Taxing Bodies to Impose Illegal and Unconstitutional Taxes With Impunity.

The American system of government is based on the proposition that no one of its branches may operate unchecked by the others. Yet in this case the Arizona Supreme Court has placed a significant area of legislative function, a large part of the power to tax, "beyond the pale" of judicial scrutiny. If the present decision is permitted to stand, the Arizona Legislature and other tax-levying governmental subdivisions may make any appropriation or tax levies they choose, however illegal or unconstitutional, so long as they clothe the appropriation or tax levies with a semblance of authority and do not run so amuck as to create a tax rate which is arbitrarily or fraudulently excessive. If they keep within these wide limits the taxpayer will have no remedy against the imposition and collection of an illegal tax. The due process clause of the Fourteenth Amendment does not permit such an unbridled use of the power to tax, as the cases cited above in part B (*supra*, pp. 16-17) show.

F. The Decision Will Have Broad and Continuing Impact.

The impact of the decision in this case is not limited to the facts of this case, nor to one year or to one taxpayer. This case is but the tip of an iceberg.[8] Of greater importance is that the decision,

[8]The iceberg's tip itself is not inconsequential. If APS is correct on the merits, the State of Arizona in 1970 collected $32,000,000 in illegal property taxes and established a tax rate over three times higher than it had a legal right to do.

unless reversed, will permit the Arizona Legislature and other governmental bodies, year after year, to continue to make appropriations and tax levies which, even though illegal, cannot be overturned in judicial proceedings. The effect of this decision will not be limited to the particular kind of illegality of the appropriation involved in this case, the illegal appropriation of reserve funds, but could be any one of many other kinds of illegal appropriation, such as, for example, an appropriation which could lead to violation of the State's debt limit under Arizona Constitution Article IX, Section 5, or an appropriation which would appropriate public money in aid of a church or private or sectarian school in violation of Arizona Constitution Article IX, Section 10.

Conclusion.

This case calls for a simple, straightforward decision, the application of a crystal clear constitutional right to correct an equally clear instance of flagrant violation of that right.

This case does not have the legal glamour of opening new constitutional vistas or of confronting a burning popular issue. Yet it is all the more important for that reason. There is little glamour in the foundations of any structure, but if the foundations are not kept sound whatever is built upon them will not long stand. The decision below, if not reversed, would leave open and subject to continuing legislative abuse a significant gap in the foundation of procedural due process.

We believe, therefore, that the question presented is of public importance and so substantial as to require plenary consideration, with briefs on the merits and oral argument, for its resolution.

Respectfully submitted,

FREDERICK K. STEINER, JR.,
EDWARD JACOBSON,
Counsel for Appellant.

Of Counsel:
SNELL & WILMER,
BURR SUTTER,
W. CHARLES THOMSON III.

APPENDIX

APPENDIX A.

Opinion.

In the Court of Appeals, State of Arizona, Division One.

State of Arizona; Ernest A. Garfield, State Treasurer of Arizona; State Tax Commission of Arizona and Waldo DeWitt, John Hazelett and Robert Kennedy, Members of and Constituting State Tax Commission of Arizona; Apache County; LaVere O. Connolly, Treasurer of Apache County; Cochise County, F. C. Alexander, Treasurer of Cochise County; Coconino County; Rose Stacy, Treasurer of Coconino County; Gila County; Roy Wood, Treasurer of Gila County; Graham County; Lola Hubbard, Treasurer of Graham County; Maricopa County; Harold D. Lafferty, Treasurer of Maricopa County; Mohave County; Ruth O. Moser, Treasurer of Mohave County; Navajo County; Raymond H. Randall, Treasurer of Navajo County; Pima County; James Lee Kirk, Treasurer of Pima County; Pinal County; Alice M. Diffin, Treasurer of Pinal County; Yavapai County; Paul J. Wedepohl, Treasurer of Yavapai County; Yuma County; Robert E. Lee, Treasurer of Yuma County, Appellants, v. Arizona Public Service Company, a corporation, Appellee. 1 CA-CIV 2354, Department B.

An Appeal from the Superior Court of Maricopa County, Cause No. C-249891. The Honorable Frederic W. Heineman, Judge.

Reversed and Remanded.

Bruce E. Babbitt, Attorney General, by James D. Winter and Fred W. Stork, Assistants Attorney General, Attorneys for Appellants; Snell & Wilmer, by Burr Sutter, Attorneys for Appellee.

Jacobson, Presiding Judge.

Filed: October 2, 1975.

The basic issue in this appeal is whether a taxpayer may recover a portion of its tax bill for taxes paid under protest against an alleged unconstitutional legislative appropriation which it is alleged contributed to an increase in those taxes.

Appellee, Arizona Public Service (APS), brought an action against the appellants, State of Arizona, the State Treasurer and the Tax Commission seeking a refund of $1,789,894.31 in property taxes for the year 1970 paid under protest. On cross-motions for summary judgment, the trial court granted APS all the relief requested and this appeal followed.

The facts are not in dispute. In 1970, the Arizona Legislature passed a general appropriation bill (Chapter 162, Session Laws 1970). Included within this general appropriation bill were two items classified as the "Capital Outlay Stabilization Fund", to which an appropriation of $12,000,000.00 was made and the "Operating Reserve" to which an appropriation of $20,000,000.00 was made. These items were included within a total of $397,056,822.00 deemed necessary by the State to carry on the State's business for the fiscal year 1970.

In 1970, the State Tax Commission calculated the State tax rate necessary to raise these revenues as follows:

Appropriations:		$397,056,822.00
Sources of Revenue:		
Estimated receipts	$305,045,831.00	
Surplus	44,292,166.00	
Total		349,337,997.00
Amount to be raised by property tax		$ 47,718,325.00

Net assessed valuation = $2,890,568,666.00

$47,718,825.00 ÷ $2,890,568,666.00 = $.0165 = $1.65 tax rate per $100 assessed valuation

In paying its tax bills for the year 1970, APS contended that the appropriations of $32,000,000.00 to the "Capital Outlay Stabilization Fund" and the "Operating Reserve" were unconstitutional appropriations and if these items were removed from the calculations of the state tax rate, the proper rate would be $.54 per $100 assessed valuation. It therefore paid under protest all its taxes to the various 14 county treasurers for those amounts exceeding a billing based upon a 54¢ tax rate.

APS subsequently brought suit pursuant to A.R.S. § 42-204 (1956) to recover those taxes paid under protest.

The State's basic contention is that APS's complaint failed to state a claim for relief and thus should be dismissed. Specifically, the State contends the failure of APS to allege that the tax levy set by the State Tax Commission was so "grossly excessive as to be arbitrary or fraudulent" defeats its action. To adequately understand the State's argument in this regard, it is necessary to set forth the background underlying the legislature's creation of the "Capital Outlay Stabilization Fund" and the "Operating Reserve" accounts.

In 1970 and prior thereto, the State Tax Commission had the authority to estimate the amount of revenue to be received by the State from sources other than direct property taxation. A.R.S. § 42-108.01 (A), (Supp. 1974) Added Laws 1967, ch. 107 § 1, amended Laws 1974, ch. 150, § 5. These sources included "income tax", "sales tax", "gasoline tax", and so forth. As set forth in the above computation, these estimated revenues, together with any surplus, subtracted from the appropriation form the basis of the direct property tax rate. It was apparently the practice of the State

Tax Commission for several years prior to 1970 to deliberately underestimate the amount of these expected revenues, in order to insure that fluctuating economic conditions which would directly affect the amount of sales tax, gasoline tax and income tax collected, did not result in the State being unable to meet its financial obligations. In the year 1970, the legislature concluded that a more sound fiscal policy would ensue if the State Tax Commission would estimate the anticipated revenues of the State accurately and to the best of its ability. In order to insure the fiscal soundness of the State's finances and hedge against unexpected economic downturns the legislature included within its appropriation bill "reserves" (the capital outlay stabilization fund and the operating reserve accounts).

For the year 1970, according to the affidavits presented, the State Tax Commission followed the legislature's directive and estimated the anticipated state revenues from sources other than the direct property tax to the best of its ability which, together with the "reserve" reflected in the legislative appropriations bill, resulting in a surplus for the year 1970-1971 of $31,031,920.00. This surplus compares with a surplus of $29,844,637.00 in 1968-69 and $44,147,683.00 in 1969-1970.

Based upon these comparative surplus figures, the State contends that the court need not reach the issue of constitutionality of the particular appropriation involved because of two arguments: (1) The tax rate set by the Commission upon which APS paid its taxes under protest is not excessive compared to previous years and thus APS's complaint for refund must be dismissed; and (2) APS has not suffered a loss since the surplus generated for the year 1970-71 was carried

over to the following year resulting in a lowering of the tax rate for that year from which APS benefited and therefore to allow APS to recover taxes for the year 1970 would result in a double recovery to APS.

The State's first argument is predicated upon the holding in Cochise County v. Southern Pacific Co., 99 Ariz. 385, 409 P.2d 549 (1966). In this second Cochise County v. Southern Pacific Co. case,[1] the facts were that the State Board of Equalization, which at that time set the state property tax rate, was advised by the State Superintendent of Public Instruction that the sum of $10,115,170.00 was needed for high school education. This figure was based upon a computation using "average daily enrollment" figures for high school students. In fact, this figure was incorrect. The correct figure should have been based upon a computation using "average daily attendance" figures for high school students. The result was that the incorrect figure actually increased the taxes of the taxpayer in the amount of $24,902.92.

Under these facts, the Supreme Court (in a three to two decision) held in *Cochise* that:

> "The board of equalization has the duty of fixing the rate of levy for state taxes as prescribed in A.R.S. § 42-141 et seq. Unless this rate was so grossly excessive as to show it was arbitrary or fraudulent . . . such a levy cannot be set aside. Although the board acted on incorrect information, there is no showing that the rate was grossly excessive or that the action of the board was in fact arbitrary or fraudulent." 99 Ariz. at 393-94, 409 P.2d at 555.

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[1]The first Cochise County v. Southern Pacific case dealt with the constitutionality of discriminatory tax assessments. See Southern Pacific Co. v. Cochise County, 92 Ariz. 395, 377 P.2d 770 (1963).

Based upon this holding, the State in this case argues that although the State Tax Commission may have acted on incorrect figures supplied to it by the legislature (conceding for the purpose of this argument that the legislative appropriation may have included unconstitutional appropriations) unless APS can show that the tax rate actually set was so excessive as to be arbitrary or fraudulent, its action must fail. This element the State contends, APS failed to allege or prove.

APS counters this argument by contending that the second *Cochise* case is in reality a "discretionary" case rather than a "legality" case and points to the following language contained in Maricopa County v. Southern Pacific Company, 63 Ariz. 342, 162 P.2d 619 (1945) to support its contention that where the legality of the rate set is attacked, it need not allege or prove excessiveness amounting to fraudulent or arbitrary action:

> "A levy may be excessive either because it will result in the collection of a sum more than is needed, or because it is greater in amount or rate than the limit fixed by the constitution or a statute. In the first case, the courts rarely interfere, since the amount is largely in the discretion of the levying body.
>
> * * *
>
> "As we construe the pleadings, the amount of the levy, strictly speaking, is not an issue; hence the question of whether there was an abuse of discretion by the board of supervisors in fixing the budget and levy need not be determined. Plaintiff does not attack the rate of the levy, but confines its attack to the want of authority to make the levy." 63 Ariz. at 346-47, 162 P. 2d at 622.

From this premise, APS argues that if it were attacking the discretionary actions of the Tax Commission in setting the rate for the year 1970, the holding in the second *Cochise* case would be applicable and it would have to show excessiveness amounting to fraudulent or arbitrary conduct. However, it argues, it does not attack any discretionary act of the Commission but attacks the mechanical process of including within its mathematical computation illegal and unconstitutional appropriation—in essence, the legality of the base from which the Tax Commission starts.

We agree that APS's position is logically sound. However, we have a great deal of difficulty in reconciling that logical position with the majority holding in Cochise County v. Southern Pacific, *supra*. While APS attempts to cast the second *Cochise* case in a discretionary category, in reality what Southern Pacific was attacking was the illegality of the computation supplied by the Superintendent of Public Instruction, not the discretion of the Board of Equalization in setting the rate. However, the majority in the *Cochise* case held:

> "[W]e have held the board of equalization, in carrying out its tax-setting power, acts judicially, and cannot be attacked in the absence of a showing that the board acted in bad faith, or so arbitrarily as to amount to constructive fraud.
>
> * * *
>
> "Examination of the facts in the instant case shows that the state board of equalization did not act arbitrarily or fraudulently, because it acted as the statute directed on the certification of the state superintendent of public instruction." 99 Ariz. at 391-93, 409 P.2d at 553-555.

We find no rational difference between acting on the illegality of figures supplied by an executive agency as was done in *Cochise* and acting on the illegality of figures supplied by the legislature. Moreover, we do not see any rational difference between illegality arising from violation of a statute as was done by the Superintendent of Public Instruction in the *Cochise* case and illegality arising from violations of the constitution as is alleged in this case. If anything, the moral outrage is greater in completely disregarding a statute clear on its face, than in following a legislative enactment which carries with it a presumption of constitutionality.

In sum, we are unable to logically differentiate between the legal principles presented in the *Cochise* case with those presented here. This does not mean, however, that we agree with those principles. In our opinion, it is illogical to attribute discretionary functions to the State Tax Commission when dealing with its mechanical, mathematical function of setting a tax rate. Here the legislature supplied the State Tax Commission with a figure which was constitutionally proper or it was not. The Commission exercises no discretion whether to use that figure in setting up tax rates; it is statutorily mandated to do so. A.R.S. § 42-108.01 (as in effect 1970). This is a ministerial function. State v. Airesearch Mfg. Co., Inc., 68 Ariz. 342, 206 P.2d 562 (1949). We would agree that if APS were alleging that the State Tax Commission had underestimated the anticipated revenues (in our opinion, a discretionary act of the commission) which resulted in a tax rate higher than was necessary to satisfy current state expenses, the rationale voiced by the majority holding in *Cochise* would logically apply and

the complaining taxpayer should be required to show excessiveness in the tax rate amounting to fraudulent or arbitrary conduct. This is the holding of the cases cited by the majority in *Cochise* to support its reasoning. *See,* United Globe Mines v. Gila County, 12 Ariz. 217, 100 P. 774 (1909); People ex rel. Thompson v. Chicago & N.W.R. Co., 397 Ill. 266, 73 N.E.2d 418 (1947); State ex rel and to Use of Johnson v. St. Louis-San Francisco Ry. Co., 315 Mo. 430, 286 S.W. 360 (1926); and State ex rel. Woodward v. Peal, 136 Kan. 136, 13 P.2d 302 (1932).

APS is not attacking this discretionary function (nor was Southern Pacific in the *Cochise* case). Rather, it is complaining that the figures supplied to it by the legislature over which it had no discretionary control contained unconstitutional items and by reason of these alleged unconstitutional appropriations the tax rate was illegally set. Excessiveness in this context is not an issue—unconstitutionality of the legislative action is. Justice, in our opinion, should mandate that the constitutionality of the tax setting function should not depend upon whether the unconstitutionality results in an excessive tax rate. To do so condones unconstitutional legislative action, so long as no taxpayer is hurt excessively.

Be that as it may, we have previously indicated we can find no logical distinction between APS's position here and Southern Pacific's position in the second *Cochise* case. It is further our opinion that that case is controlling on the issues here and not having the power to overrule Supreme Court decisions, McKay v. Industrial Commission, 103 Ariz. 191, 438 P.2d 757 (1968), we must follow its mandate, leaving to the Supreme Court the decision of whether it should reconsider its holding.

Pursuant to the holding in Cochise v. Southern Pacific, *supra*, we hold that APS having failed to allege and prove that the alleged unconstitutional appropriation resulted in an excessive tax rate so as to be fraudulent or arbitrary, its complaint should have been dismissed.

The judgment of the trial court is reversed and the matter remanded with directions to enter judgment in favor of the State Tax Commission.

/s/ Eino M. Jacobson
Eino M. Jacobson, Presiding Judge

Concurring:

/s/ William E. Eubank
William E. Eubank, Judge

/s/ Levi Ray Haire
Levi Ray Haire, Chief Judge
Division 1.

APPENDIX B.

Order.

In the Court of Appeals, State of Arizona, Division One.

State of Arizona; Ernest A. Garfield, State Treasurer of Arizona; State Tax Commission of Arizona and Waldo DeWitt, John Hazelett and Robert Kennedy, Members of and Constituting State Tax Commission of Arizona; Apache County; LaVere O. Connolly, Treasurer of Apache County; Cochise County; F. C. Alexander, Treasurer of Cochise County; Coconino County, Rose Stacy, Treasurer of Coconino County; Gila County; Roy Wood, Treasurer of Gila County; Graham County; Lola Hubbard, Treasurer of Graham County; Maricopa County; Harold D. Lafferty, Treasurer of Maricopa County; Mohave County; Ruth O. Moser, Treasurer of Mohave County; Navajo County; Raymond H. Randall, Treasurer of Navajo County; Pima County; James Lee Kirk, Treasurer of Pima County; Pinal County; Alice M. Diffin, Treasurer of Pinal County; Yavapai County; Paul J. Wedepohl, Treasurer of Yavapai County; Yuma County; Robert E. Lee, Treasurer of Yuma County, Appellants, v. Arizona Public Service Company, a corporation, Appellee. 1 CA-CIV 2354, Department B, Maricopa County Superior Court No. C-249891.

FILED. Nov. 7, 1975.

The motion for rehearing has been considered by the Court, Presiding Judge Eino M. Jacobson and Judges William E. Eubank and Levi Ray Haire participating.

IT IS ORDERED that the motion for rehearing is denied.

DATED this 7th day of November, 1975.

/s/ Eino M. Jacobson
EINO M. JACOBSON
PRESIDING JUDGE

A true copy of the foregoing order was mailed this 7th day of November, 1975, to:

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CLASSIE GANTT, Clerk
By
/s/ Muriel S. Hume
Deputy Clerk

APPENDIX C.

Supreme Court, State of Arizona, 201 South-West Wing, Capitol Building, Phoenix 85007, December 17, 1975.

State of Arizona; Ernest A. Garfield, State Treasurer of Arizona; State Tax Commission of Arizona and Waldo DeWitt, John Hazelett and Robert Kennedy, Members of and Constituting State Tax Commission of Arizona; Apache County; LaVere O. Connolly, Treasurer of Apache County; Cochise County, F. C. Alexander, Treasurer of Cochise County; Coconino County; Rose Stacy, Treasurer of Coconino County; Gila County; Roy Wood, Treasurer of Gila County; Graham County; Lola Hubbard, Treasurer of Graham County; Maricopa County; Harold D. Lafferty, Treasurer of Maricopa County; Mohave County; Ruth O. Moser, Treasurer of Mohave County; Navajo County; Raymond H. Randall, Treasurer of Navajo County; Pima County; James Lee Kirk, Treasurer of Pima County; Pinal County; Alice M. Diffin, Treasurer of Pinal County; Yavapai County; Paul J. Wedepohl, Treasurer of Yavapai County; Yuma County; Robert E. Lee, Treasurer of Yuma County, Appellants, vs. Arizona Public Service Company, a corporation, Appellee. Supreme Court No. 12372-PR; Court of Appeals No. 1 CA-CIV 2354; Maricopa County No. C-249891.

The following action was taken by the Supreme Court of the State of Arizona on December 16, 1975 in regard to the above-entitled cause:

"ORDERED: Petition for Review—DENIED."

Record returned to the Court of Appeals, Division One, Phoenix, this 17th day of December, 1975.

APPENDIX D.

Order.

In the Court of Appeals, State of Arizona, Division One.

State of Arizona, et al., Appellants, v. Arizona Public Service Company, a corporation, Appellee. 1 CA-CIV 2354, Department B; Maricopa County Superior Court No. C-249891.

Filed: Jan. 30, 1976.

Appellee's motion that the mandate herein include a provision granting leave to amend appellee's complaint or to allow the trial court to grant such leave, and the response thereto, were considered by the Court, Presiding Judge Eino M. Jacobson and Judges William E. Eubank and Levi Ray Haire participating.

IT IS ORDERED denying appellee's said motion.

DATED this 30th day of January, 1976.

/s/ Eino M. Jacobson
EINO M. JACOBSON
PRESIDING JUDGE

A true copy of the foregoing
order was mailed this 30th day
of January, 1976, to:

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CLASSIE GANTT, Clerk
By
/s/ Muriel S. Hume
Deputy Clerk

CLIFFORD H. WARD, Clerk
/s/ Mary Ann Hopkins
Deputy Clerk

To: Burr Sutter, Esq., Snell & Wilmer, 3100 Valley Center, Phoenix, Arizona 85073; Hon. Bruce E. Babbitt, Attorney General, 159 Capitol Building, Phoenix, Arizona 85007 Attn: James D. Winter and Fred W. Stork, Assistant Attorneys General; Hon. Frederic W. Heineman, Judge, Maricopa County Superior Court, 101 West Jefferson, Phoenix, Arizona 85003; Classie Gantt, Clerk of the Court of Appeals, Division One, 1700 West Washington-West Wing, Phoenix, Arizona 85007; West Publishing Company, 50 Kellogg Blvd., St. Paul, Minnesota 55102.

rs

APPENDIX E.

Mandate.

In the Court of Appeals, State of Arizona, Division One.

State of Arizona; Ernest A. Garfield, State Treasurer of Arizona; State Tax Commission of Arizona and Waldo DeWitt, John Hazelett and Robert Kennedy, Members of and Constituting State Tax Commission of Arizona; et al., Appellants, vs. Arizona Public Service Company, a corporation, Appellee. 1 CA-CIV 2354, Department B.

To: The Honorable Superior Court for Maricopa County, Arizona, in relation to Cause No. C-249891.

GREETINGS:

The above cause was presented in your Court and was brought before Division One of the Court of Appeals of the State of Arizona in the manner prescribed by law. This Court rendered its opinion and caused the same to be filed on the 2nd day of October, 1975.

A petition for review was filed. The record was forwarded to the Arizona Supreme Court. By order dated 16th day of December, 1975, the Arizona Supreme Court denied the petition for review, Supreme Court No. 12372-PR.

NOW, THEREFORE, YOU ARE COMMANDED that such proceedings be had in said cause as shall be required to comply with the opinion of this Court, a copy of the opinion being attached hereto.

WITNESS, THE HONORABLE EINO M. JACOBSON, Presiding Judge, Department B, Division One of the Court of Appeals of the State of Arizona, this 9th day of February, 1976.
(Seal)

CLASSIE GANTT, Clerk
By /s/ Curvey Walters
Deputy Clerk

The original of the foregoing MANDATE and a copy of the opinion of the Court were mailed to the Clerk of the Superior Court for Maricopa County, Arizona, this 9th day of February, 1976. A copy of the MANDATE was mailed on said day to each party appearing or the attorneys of record.

CLASSIE GANTT, Clerk
By /s/ Curvey Walters
Deputy Clerk

APPENDIX F.

Judgment.

In the Superior Court of the State of Arizona, in and for the County of Maricopa.

Arizona Public Service Company, a corporation, Plaintiff, vs. State of Arizona et al., Defendants. No. C 249891.

Filed: March 4, 1976.

The Superior Court of Maricopa County having rendered judgment for the Plaintiff in the above entitled matter; the Defendants having appealed; the Court of Appeals having reversed and set aside the judgment of the Superior Court and remanded the case with directions to enter judgment in favor of Defendants and the Mandate of the Court of Appeals having been issued;

IT IS ORDERED, ADJUDGED AND DECREED that the judgment of the Superior Court in the above-entitled action in favor of the Plaintiff is hereby vacated and the Defendants are hereby granted judgment in accordance with the Mandate of the Court of Appeals and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of the Defendants.

DATED this 23rd day of February 1976.

/s/ Frederic W. Heineman
JUDGE OF SUPERIOR COURT

Approved as to form this 18th day of February, 1976 by:

SNELL & WILMER
/s/ Burr Sutter
By Burr Sutter
Attorneys for Plaintiff

APPENDIX G.

Notice of Appeal to the Supreme Court of the United States.

In the Court of Appeals, State of Arizona, Division One.

State of Arizona; Ernest A. Garfield, State Treasurer of Arizona; State Tax Commission of Arizona and Waldo DeWitt, John Hazelett and Robert Kennedy, Members of and Constituting State Tax Commission of Arizona; Apache County; LaVere O. Connolly, Treasurer of Apache County; Cochise County, F. C. Alexander, Treasurer of Cochise County; Coconino County; Rose Stacy, Treasurer of Coconino County; Gila County; Roy Wood, Treasurer of Gila County; Graham County; Lola Hubbard, Treasurer of Graham County; Maricopa County; Harold D. Lafferty, Treasurer of Maricopa County; Mohave County; Ruth O. Moser, Treasurer of Mohave County; Navajo County; Raymond H. Randall, Treasurer of Navajo County; Pima County; James Lee Kirk, Treasurer of Pima County; Pinal County; Alice M. Diffin, Treasurer of Pinal County; Yavapai County; Paul J. Wedepohl, Treasurer of Yavapai County; Yuma County; Robert E. Lee, Treasurer of Yuma County, Appellants, v. Arizona Public Service Company, a corporation, Appellee. 1 CA-CIV 2354, Department B.

I.

Notice is hereby given that Arizona Public Service Company, ("APS" hereinafter) the Appellee above named, hereby appeals to the Supreme Court of the

United States from the final judgment of the Superior Court of the State of Arizona, in and for the County of Maricopa, dated February 23, 1976, entered March 4, 1976, pursuant to the Mandate of the Court of Appeals of the State of Arizona, Division One, issued February 9, 1976, after denial of review by the Supreme Court of the State of Arizona on December 16, 1975.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

DATED: April 14th, 1976.

/s/ Frederick K. Steiner, Jr.
/s/ Edward Jacobson
Frederick K. Steiner, Jr.
Edward Jacobson
SNELL & WILMER
3100 Valley Center
Phoenix, AZ 85073
Attorneys for Arizona Public
Service Company

Of Counsel:
Burr Sutter
W. Charles Thomson III
SNELL & WILMER
3100 Valley Center
Phoenix, AZ 85073

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of April, 1976 three copies of this Notice of Appeal were mailed, postage prepaid, to the Attorney General of the State of Arizona, Phoenix, Arizona, 1700 West Washington, Phoenix, Arizona.

I further certify that all parties required to be served have been served.

DATED: April 14, 1976.

/s/ Edward Jacobson
Edward Jacobson
SNELL & WILMER
3100 Valley Center
Phoenix, AZ 85073
Attorneys for Arizona Public
Service Company

Notice of Appeal to the Supreme Court of the United States.

In the Superior Court of the State of Arizona, in and for the County of Maricopa.

Arizona Public Service Company, a corporation, Plaintiff, v. State of Arizona; Ernest A. Garfield, State Treasurer of Arizona; State Tax Commission of Arizona and Waldo DeWitt, John Hazelett and Robert Kennedy, Members of and Constituting State Tax Commission of Arizona; Apache County; LaVere O. Connolly, Treasurer of Apache County; Cochise County, F. C. Alexander, Treasurer of Cochise County; Coconino County; Rose Stacy, Treasurer of Coconino County; Gila County; Roy Wood, Treasurer of Gila County; Graham County; Lola Hubbard, Treasurer of Graham County; Maricopa County; Harold D. Lafferty, Treasurer of Maricopa County; Mohave County; Ruth O. Moser, Treasurer of Mohave County; Navajo County; Raymond H. Randall, Treasurer of Navajo County; Pima County; James Lee Kirk, Treasurer of Pima County; Pinal County; Alice M. Diffin, Treasurer of Pinal County; Yavapai County; Paul J. Wedepohl, Treasurer of Yavapai County; Yuma County; Robert E. Lee, Treasurer of Yuma County, Defendants. No. C 249891.

I

Notice is hereby given that Arizona Public Service Company ("APS" hereinafter) the Plaintiff above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Superior Court of the State of Arizona, in and for the County of Maricopa, dated February 23, 1976, entered March

4, 1976, pursuant to the Mandate of the Court of Appeals of the State of Arizona, Division One, issued February 9, 1976, after denial of review by the Supreme Court of the State of Arizona on December 16, 1975.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

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/s/ Edward Jacobson
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Phoenix, AZ 85073
Attorneys for Arizona Public Service Company

Of Counsel:
Burr Sutter
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3100 Valley Center
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I further certify that all parties required to be served have been served.

DATED: April 14, 1976.

/s/ Edward Jacobson
Edward Jacobson
SNELL & WILMER
3100 Valley Center
Phoenix, AZ 85073
Attorneys for Arizona Public Service Company

APPENDIX H.

Findings of Fact, Conclusions of Law and Judgment.

In the Superior Court of the State of Arizona, in and for the County of Maricopa.

Arizona Public Service Company, a corporation, Plaintiff, vs. State of Arizona, et al., Defendants' No. C 249891.

Filed January 30, 1973.

This action came on regularly for hearing before the Court, the Honorable Frederic W. Heineman, presiding. The issues having been duly heard and, based upon the pleadings, discovery, oral arguments, briefs, exhibits and other materials filed by the parties, the Court makes Findings of Fact, states Conclusions of Law, and renders Judgment as follows:

FINDINGS OF FACT

The Court adopts the following Findings of Fact:

1. The General Appropriations Bill enacted in the Second Regular Session of the 29th Arizona Legislature, (Chapter 162, Laws 1970) included an appropriation of $12,000,000 to a "Capital Outlay Stabilization Fund" and an appropriation of $20,000,000 to an "Operating Reserve."

2. On the second Monday of August, 1970, the defendant State Tax Commission met (pursuant to A.R.S. § 42-108.01B) to fix and determine the ad valorem tax rate for state purposes. In so doing, it included the total of the aforesaid two appropriations ($32,000,000) in determining the amount to be raised

by a levy of taxes on real and personal property for the fiscal year ending June 30, 1971.

3. The state tax rate on real and personal property was fixed at $1.65 per $100 of assessed valuation and, had the defendant Commission not computed the tax rate and levied taxes in such way as to raise, in addition to all other requirements, the sum of $32,-000,000 as aforesaid, the tax rate levied against the real and personal property subject to taxation in the state would have been $0.54 per $100 of assessed valuation.

4. Plaintiff owns real and personal property in each of twelve counties in the state, namely: Apache, Cochise, Coconino, Gila, Graham, Maricopa, Mohave, Navajo, Pima, Pinal, Yavapai and Yuma counties.

5. On or before November 2, 1970, Plaintiff, timely and otherwise in accordance with law, paid to each of the treasurers of the aforesaid counties the first half of ad valorem taxes levied in the year 1970 and on or before May 3, 1971, plaintiff, timely and otherwise in accordance with law, paid the second half of such taxes.

6. A part of each such payment was made under written protest, timely, and otherwise in accordance with law, made and filed with each such payment. The protested portion was that amount attributable to the difference between the $1.65 tax rate levied for state purposes and the $0.54 rate which would have been levied if the two appropriations had not been made.

7. The amount of such taxes paid under protest for the first half of 1970 to each of the county treasurers is as follows:

County	*Amount Protested*
Apache	$ 21,280.55
Cochise	26,802.15
Coconino	79,147.94
Gila	24,374.89
Graham	847.49
Maricopa	479,679.59
Mohave	15,323.25
Navajo	85,315.89
Pima	2,044.93
Pinal	73,580.18
Yavapai	43,012.71
Yuma	43,550.41
Total	$894,959.98

8. The amount of such taxes paid under protest to each of the county treasurers for the second half of 1970 is as follows:

County	*Amount Protested*
Apache	$ 21,280.55
Cochise	26,802.15
Coconino	79,147.94
Gila	24,374.89
Graham	847.49
Maricopa	479,654.03
Mohave	15,323.25
Navajo	85,315.88
Pima	2,044.93
Pinal	73,580.18
Yavapai	43,012.71
Yuma	43,550.41
Total	$894,934.41

Thereafter, plaintiff brought this action pursuant to A.R.S. § 42-204C which provides:

> "After payment of the tax, an action may be maintained to recover any tax illegally collected, and if the tax due is determined to be less than the amount paid, the excess shall be refunded in the manner provided by this title."

CONCLUSIONS OF LAW

The Court concludes, as matters of law, the following:

1. The Court has jurisdiction over the subject matter of this action and the parties hereto.

2. The plaintiff has stated a cause of action upon which relief can be granted.

3. Plaintiff has selected the proper remedy, namely, payment under protest and a suit to recover pursuant to A.R.S. § 42-204C.

4. There is no genuine issue of material fact.

5. The sole question for determination is whether the two appropriations ($12,000,000 to a Capital Outlay Stabilization Fund and $20,000,000 to an Operating Reserve) included in the General Appropriations Bill of the Second Regular Session of the 29th Arizona Legislature, Chapter 162, Laws 1970, and the tax levied to raise revenues to satisfy the same, are valid and in conformity with law.

6. The rule that taxes may be recovered only if the tax rate is so grossly excessive as to be arbitrary

or fraudulent is not applicable or determinative in this case.

7. The two appropriations violate the first sentence of Article 9, Section 3 of the Arizona Constitution and A.R.S. § 42-108.01B in that they caused a tax to be levied for purposes other than to defray the necessary and ordinary expenses of the state during the current fiscal year.

8. The two appropriations and the tax levied to raise revenue to satisfy the same are in violation of the second paragraph of Article 9, Section 3 and Article 9, Section 9 of the Arizona Constitution which require that the object of a tax must be distinctly stated in every tax law and the tax funds can be applied only to such object.

9. The two appropriations violate Article 4, Part 2, Section 20 of the Arizona Constitution which requires that a General Appropriations Bill embrace only appropriations for the different departments of the state, for state institutions, for public schools and for interest on the public debt.

10. Although plaintiff alleged that the two appropriations violate the equal protection clause of the 14th Amendment to the United States Constitution, the point was not briefed or argued to the Court, and the Court makes no ruling thereon.

11. The two appropriations are in violation of the Financial Code (Title 35, Chapter 1, Article 5 A.R.S.), particularly A.R.S. § 35-173B and § 35-182, which

require that appropriations be made only to officers, departments or agencies charged with specific duties in relation to the handling of state funds.

12. The appropriation of $12,000,000 to a Capital Outlay Stabilization Fund and that portion of A.R.S. § 35-131.03 which provides that "no part of such fund may be expended without specific authorization of the legislature" are contrary to Article 3 of the Arizona Constitution which provides for the separation of powers and prohibits the legislative department from engaging in functions of the executive department and Article 4, Part 2, Section 5 of the Arizona Constitution which prohibits any member of the legislature from holding any other office or being otherwise employed by the State of Arizona.

13. The levy of ad valorem taxes for state purposes for the fiscal year 1970-71 at a rate in excess of $0.54 per $100 of assessed valuation was and is unconstitutional and contrary to law.

14. Plaintiff is entitled to recover that portion of ad valorem taxes paid for state purposes for the fiscal year 1970-71 which resulted from the levy of taxes at a rate in excess of $0.54 per $100 of assessed valuation.

15. The taxes paid under protest by plaintiff were illegally levied and collected by defendants and plaintiff is entitled to recover, as provided in A.R.S. § 42-152.E, the full amount thereof in the sum of $1,786,547.83 with legal interest thereon from the dates of payment until the dates of refund.

16. Plaintiff is entitled to judgment for the refund of such taxes by the defendants as provided in A.R.S. § 42-152.E in the following amounts:

County	*Amount*
Apache	$ 21,240.75
Cochise	26,753.15
Coconino	78,999.90
Gila	24,329.30
Graham	845.91
Maricopa	478,782.41
Mohave	15,294.59
Navajo	85,156.27
Pima	2,041.15
Pinal	73,442.56
Yavapai	42,932.26
Yuma	43,468.96

with interest thereon at the rate of 6% per annum from November 2, 1970, until paid.

County	*Amount*
Apache	$ 21,240.75
Cochise	26,753.15
Coconino	78,999.90
Gila	24,329.30
Graham	845.91
Maricopa	478,755.82
Mohave	15,294.59
Navajo	85,156.27
Pima	2,041.15
Pinal	73,442.56
Yavapai	42,932.26
Yuma	43,468.96

with interest thereon at the rate of 6% per annum from May 3, 1971, until paid.

17. Plaintiff is entitled, as a matter of law, to judgment in the amounts (including interest) set forth hereinabove.

JUDGMENT

IT IS ORDERED AND ADJUDGED, as follows:

1. That plaintiff's Motion for Summary Judgment is granted.

2. That defendants' Motion for Summary Judgment is denied.

3. That plaintiff have judgment for the recovery of taxes paid under protest in the total sum of $1,-786,547.83 with interest thereon at the rate of 6% per annum from date of payment, until paid, such sum plus such interest to be refunded or credited by the defendants as provided in A.R.S. § 42-152.E in the following amounts:

County	*Amount*
Apache	$ 21,240.75
Cochise	26,753.15
Coconino	78,999.90
Gila	24,329.30
Graham	845.91
Maricopa	478,782.41
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Yavapai	42,932.26
Yuma	43,468.96

with interest thereon at the rate of 6% per annum from May 3, 1971, until paid.

DATED this 29th day of January, 1973.

/s/ Frederic W. Heineman
Judge

(Certification of Service)

APPROVED as to form this 30th day of January, 1973,

GARY K. NELSON
Attorney General

By /s/ James D. Winter
Attorney for Defendants

APPENDIX I.

§ 42-124.01. *Determination of location, description and valuation of gas, water and electric utilities and pipelines*

On or before the first Monday in June the department shall find within each taxing district of the state the location and full cash value of the property of all gas, water and electric utilities and pipelines operating within the state and, on or before the third Monday in June, transmit to the several boards of supervisors the location, description and valuation thereof within such taxing district. Added Laws 1967, Ch. 107, § 3, as amended Laws 1967, 3rd S.S., Ch. 12, § 1; Laws 1970, Ch. 85, § 2.

§ 42-124.02. *Appearance prior to determination of valuation; notice of determination of valuation; change of valuation; appeal*

A. At any time prior to the determination of valuation of any property by the department as prescribed under this title, any interested person may on written application appear before and be heard by the department. The department may hold informal hearings regarding such applications.

B. Immediately upon the determination of the valuation of any property by the department it shall send by certified or registered mail a copy of such valuation to the property owner.

C. After the determination of valuation of any property by the department and before the department transmits the valuation to the appropriate assessing authority, the department may upon the written application of the property owner, or on its own motion

change the valuation to properly reflect the full cash value thereof and the property owner shall immediately be given notice of the change by certified or registered mail.

D. Any person not satisfied with the valuation of any property as transmitted by the department may appear before the state board at such time as the board may direct and show cause why the valuation should be changed. The property owner shall be notified of the time and place of the hearing and shall be entitled to be heard at any such hearing regarding the valuation of his property. If the state board orders the valuation changed a certified copy of the order shall be at once forwarded to the property owner and to the officers of the state, county, city or town in charge of tax assessments who shall cause the roll to be corrected accordingly. Appeal from the decision of the state board may be taken in the manner provided in § 42-146. Added Laws 1967, Ch. 107, § 3, as amended Laws 1970, Ch. 82, § 1.

§ 42-146. *Appeal from tax commission or state board of equalization assessment; payment of tax as prerequisite to appeal*

A. Any taxpayer dissatisfied with the amount of his assessment as fixed by the state tax commission, or as reviewed by the state board of equalization, may appeal therefrom as provided in this article and not otherwise.

B. The appeal shall be taken on or before September 15 following adjournment of the board of equalization by serving a written notice to that effect on the county treasurer of the county in which the taxes are payable. No appeal shall be taken unless the appel-

lant first pays to the county treasurer the amount of taxes levied and assessed against his property, and unless so paid, the appeal shall be dismissed by the court. The appellant shall file with the county treasurer concurrently with the appeal a statement of the reasons why the assessment in question is erroneous or excessive.

C. The county treasurer shall give a receipt for the amount when paid, and shall transmit a copy of the receipt, notice of appeal and statement of protest to the state board of equalization. Upon receipt thereof, the secretary of the board shall transmit the papers together with a certified copy of the proceedings of the board relating to appellant to the clerk of the superior court of the county in which appellant's property is located, and the clerk shall docket the appeal in the name of appellant as plaintiff and of the county and the board as defendants.

Supreme Court, U. S.
FILED
MAY 26 1976

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1569

ARIZONA PUBLIC SERVICE COMPANY, a corporation,

Appellant,

vs.

THE STATE OF ARIZONA; ERNEST A. GARFIELD, STATE TREASURER OF ARIZONA; STATE TAX COMMISSION OF ARIZONA and WALDO DeWITT, JOHN HAZELETT and ROBERT KENNEDY, MEMBERS OF AND CONSTITUTING STATE TAX COMMISSION OF ARIZONA; APACHE COUNTY; LaVERE O. CONNOLLY, TREASURER OF APACHE COUNTY; COCHISE COUNTY; F. C. ALEXANDER, TREASURER OF COCHISE COUNTY; COCONINO COUNTY; ROSE STACY, TREASURER OF COCONINO COUNTY; GILA COUNTY; ROY WOOD, TREASURER OF GILA COUNTY; GRAHAM COUNTY; LOLA HUBBARD, TREASURER OF GRAHAM COUNTY; MARICOPA COUNTY; HAROLD D. LAFFERTY, TREASURER OF MARICOPA COUNTY; MOHAVE COUNTY; RUTH O. MOSER, TREASURER OF MOHAVE COUNTY; NAVAJO COUNTY; RAYMOND H. RANDALL, TREASURER OF NAVAJO COUNTY; PIMA COUNTY; JAMES LEE KIRK, TREASURER OF PIMA COUNTY; PINAL COUNTY; ALICE M. DIFFIN, TREASURER OF PINAL COUNTY; YAVAPAI COUNTY; PAUL J. WEDEPOHL, TREASURER OF YAVAPAI COUNTY; YUMA COUNTY; ROBERT E. LEE, TREASURER OF YUMA COUNTY,

Appellees,

ON APPEAL FROM SUPREME COURT OF ARIZONA

MOTION TO DISMISS AND BRIEF IN SUPPORT OF MOTION

BRUCE E. BABBITT
Attorney General

JAMES D. WINTER
FRED W. STORK III
Assistant Attorneys General
338 State Capitol
Phoenix, Arizona 85007
Attorneys for Appellees

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1569

ARIZONA PUBLIC SERVICE COMPANY,
a corporation,

Appellant,

vs.

THE STATE OF ARIZONA, et al.,

Appellees.

MOTION TO DISMISS AND BRIEF
IN SUPPORT OF MOTION

The Appellees move the Court to dismiss the appeal on the grounds that: (1) the appeal was not taken in conformity with the applicable statutes and Rules of the United States Supreme Court; (2) the judgment rests on an adequate non federal basis; and (3) the appeal does not present a substantial federal question.

STATEMENT OF THE CASE

Arizona Public Service Company filed a complaint in the Superior Court of Maricopa County for the refund of $1,789,894.39 paid in property taxes in respect to the year 1970. The theory of the Arizona Public Service Company suit was that two items in the State's General Appropriation Act for fiscal year 1970[1/]

1/ The 1970 General Appropriation Act provided in the pertinent parts as follows:

AN ACT RELATING TO APPROPRIATIONS FOR THE DIFFERENT DEPARTMENTS OF THE STATE, FOR STATE INSTITUTIONS, AND FOR PUBLIC SCHOOLS.

. . .

Section 1. Subject to applicable laws, the sums or sources of revenue herein set forth are appropriated for the fiscal year beginning July 1, 1970, for the purposes and objects herein specified:

Subdivision 104.	CAPITAL OUTLAY STABILIZATION FUND	$12,000,000.00
Subdivision 105.	OPERATING RESERVE	$20,000,000.00

Session Laws of 1970, Chapter 162.

were unconstitutional under various provisions of the Arizona Constitution and the Equal Protection Clause of the United States Constitution and it therefore necessarily followed that the State tax rate was pro tanto unconstitutional and that the levy based on that rate was therefore unconstitutional.

The State filed a motion for judgment on the pleadings on the theory that the complaint failed to state a cause of action because the standard under Arizona law for determining the legality of a tax levy is whether the rate was so grossly excessive as to show it was arbitrary or fraudulent and that the Arizona Public Service Company complaint did not contain any such allegations. The Superior Court judge denied the motion of the State of Arizona for judgment on the pleadings.

Arizona Public Service Company filed a motion for summary judgment and the State of Ariozna thereafter filed its cross-motion for summary judgment. Arizona Public Service Company contended that the function of setting the tax rate was partly ministerial and partly discretionary. The The Superior Court granted the motion for summary judgment of Arizona Public Service Company. The Superior Court judge made findings of fact and conclusions of law in which he concluded that the complaint of Arizona Public Service Company stated a cause of action; the appropriation of the Legislation violated several provisions of the Arizona Constitution and that Arizona Public Service company was entitled to judgment on its complaint in the amount of $1,786,547.83. The judge expressly declined to rule on the constitutional question involving the Equal Protection Clause because the point was neither argued nor briefed.

The State appealed this judgment of the Superior Court to the Arizona Court of Appeals. The Arizona Court of Appeals reversed the decision of the Superior Court and remanded the case with directions to enter judgment in favor of the State. The Court of Appeals reversed on the basis of the holding in Cochise County v. Southern Pacific, 99 Ariz. 385, 409 P.2d 549 (1966), that in carrying out its tax setting power the Tax Commission had acted judicially and cannot be attacked in the absence of a showing that it acted in bad faith or so arbitrarily as to amount to constructive fraud. Arizona Public Service Company made a motion for rehearing which raised the federal constitutional question that is the subject of this appeal for the first time and that motion

was denied. On December 16, 1975 Arizona Public Service Company's Petition for Review to the Arizona Supreme Court was denied.

On December 19, 1975, Arizona Public Service Company filed a motion in the Arizona Court of Appeals entitled "Motion For The Mandate Of The Court To Permit Amendment Of The Complaint". By this motion Arizona Public Service Company sought to amend its complaint to allege for the first time that the tax rate resulting from the two appropriation items was so excessive as to be fraudulent and arbitrary. On January 30, 1976, the "Motion For The Mandate Of The Court To Permit Amendment Of The Complaint" was denied.

The mandate of the Court of Appeals was issued on February 9, 1976.

Pursuant to the mandate of the Court of Appeals, the Superior Court entered a judgment in favor of the State of Arizona and ordered its prior judgment vacated. On April 14, 1976, Arizona Public Service Company filed the notice of appeal to the United States Supreme Court. The notice of appeal stated that it was from the final judgment of the Superior Court of the State of Arizona for Maricopa County dated February 23, 1976 entered March 4, 1976 pursuant to the mandate of the Court of Appeals of the State of Arizona, Division One issued February 9, 1976 after denial of review by the Supreme Court of the State of Arizona on December 16, 1975.

SUMMARY OF ARGUMENT

This motion to dismiss is based on three grounds. First, this appeal

was not taken in conformity with the applicable statutes. Under the provisions of 28 U.S.C. 2101(c), the appeal should have been filed within ninety (90) days after the State court decision became final. This appeal was not filed within that time limit. Secondly, the decision of the Arizona Court of Appeals rests upon an adequate non federal basis. When a property tax assessment is challenged on the ground of some irregularity in the setting of the tax rate, the tax is not illegal unless the rate is so grossly excessive as to indicate that it is arbitrary or fraudulent. This case was decided on the basis of that rule of law. Regardless of whether this is characterized as a rule defining a cause of action or a burden of proof rule, it is a question of state law. Thirdly, since the issue in this case

is really a question of the scope of a cause of action or a question of burden of proof rather than a question of the scope of the remedial statute, A.R.S. § 42-204, there is really no question of the constitutionality of a state statute and there is no due process question in this case. Therefore, this appeal does not present a substantial federal question.

ARGUMENT

A. APPEAL NOT TAKEN IN CONFORMITY WITH APPLICABLE STATUTES

The time for taking this appeal began to run from the denial of the Petition for Review on December 16, 1975. Under the provisions of 28 U.S.C. 2101(c), Arizona Public Service Company had ninety (90) days within which to file its Notice of Appeal to the United States Supreme

Court. The appeal period did not begin to run from the Arizona Court of Appeal's denial of the Motion For The Mandate Of The Court To Permit Amendment Of The Complaint because the ruling on Arizona Public Service Company's federal constitutional challenge became final on December 16, 1975. The late motion and its subsequent denial did not raise any federal constitutional question. Moreover, Arizona Public Service Company is not appealing the denial of that motion. (See page 15 of Appellant's Jurisdictional Statement)

The appeal period does not run from the issuance of the mandate of the Court of Appeals or from the Superior Court judgment because they are simply ministerial acts. For the purposes of the ninety (90) day period, the test of finality is whether the order of the

appellate court has fully adjudicated rights and that adjudication is not subject to further review by a state court. Where the order or judgment is final in that sense, the time for applying to the Supreme Court of the United States runs from the date of the appellate court's order because the object of the statutes is to limit the applicant's time to three months from the date when finality of judgment for purpose of review is established. Department of Banking v. Pink, 317 U.S. 264 (1942); Cole v. Violette, 319 U.S. 581 (1943). Since the issuance of the mandate and the Superior Court judgment did not present any further opportunity for court review, they were merely ministerial acts for the purposes of 28 U.S.C. 2101(c) and the decision was final on December 16, 1975 when the

Petition for Review was denied. Since the Notice of Appeal was not filed until April 14, 1976 which was more than ninety (90) days after December 16, 1975, Arizona Public Service Company has not complied with the provisions of 28 U.S.C. 2101(c) which requires the filing of the Notice of Appeal within ninety (90) days.

B. JUDGMENT RESTS ON AN ADEQUATE NON FEDERAL BASIS

This case involves a tax appeal problem. Under Arizona law the legality of a tax may be challenged on the ground that an exemption is applicable, the tax is discriminatory, the property is not located in the jurisdiction imposing the tax, or numerous other grounds. The legality of a tax is seldomly challenged on the ground that the tax is illegal because of some irregularity

in the setting of the tax rate or in the General Appropriations Act. For cases of this type, the test usually applied is to determine whether the tax levy is so grossly excessive as to constitute a constructive fraud on the taxpayers. Rogge v. Petroleum County, 107 Mont. 36, 80 P.2d 380 (1938).

From the decision in Cochise County v. Southern Pacific Company, 99 Ariz. 385, 409 P.2d 549 (1966), and the decision of the Court of Appeals in this case, it is clear that Arizona follows the general rule. The rationale of this rule is found in the Court decisions. Taxing authorities must anticipate as nearly as they can the amount of money necessary for operating their political subdivision and arrange to have funds ready to meet obligations when due. People v. Chicago Burlington

& Quincy R.R., 8 Ill.2d 382, 134 N.E.2d 335 (1956). A proper rate of tax to produce the amount required is a matter which must rest largely within the discretion of the officials levying the taxes since it is uncertain what deficiencies in collection will amount to. People v. Wabash Ry., 296 Ill. 527, 129 N.E. 826 (1921). The mere circumstance that in estimating in advance the amount necessary for any purpose a larger amount is levied than is actually required affords the taxpayer no ground for objection unless the amount levied is so grossly excessive to show a fraudulent purpose. People v. Chicago and N.W.R.R., 397 Ill. 266, 73 N.E.2d 418 (1947).

This case was decided on the basis of the Arizona Supreme Court decision

in Cochise County v. Southern Pacific Company, supra. The rule of this case that one challenging a tax on the ground of irregularity in setting the tax rate must show the levy to be so excessive as to indicate it is arbitrary or fraudulent in order to be entitled to relief is a matter of state law. When all of the circumstances of the tax rate setting function are considered the rule is equitable, just and practical. The salutary purpose of this rule is to avoid overwhelming the courts with litigation which would ultimately be inconsequential in its effect. Except for the size of its property holdings, Arizona Public Service Company is in the same position in this matter as all of the other property taxpayers in the state.

It has not suffered any damage which distinguishes it from them.

Setting the tax rate is and necessarily must be a discretionary function. The court can take judicial notice of the fact that it is unlikely that anyone who has the responsibility for setting a tax rate to balance a budget involving hundreds of millions of dollars of revenue is going to be able to estimate precisely a year in advance the exact amount required to balance the budget. Since the judgment rests on this independent and adequate non federal ground, the Supreme Court does not have jurisdiction. Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487 (1965). The case should be dismissed for this reason alone.

C. APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

This case really deals with a definition of a cause of action rule or a burden of proof rule rather than a question of procedural due process. In any event it does not involve the constitutionality of A.R.S. § 42-204. That statute provides that the remedy for an illegally collected tax is a suit in the superior court. That statute does not undertake to define illegally collected taxes. What constitutes an illegally collected tax has to be decided by reference to other statutes and the common law rather than by statutory construction of A.R.S. § 42-204. This appeal was filed under 28 U.S.C. 1257(2) according to the Notice of Appeal. Since the decision of the Arizona Court of

Appeals did not and could not reasonably be considered to have involved the constitutionality of A.R.S. § 42-204 or any other state statute, the Supreme Court does not have jurisdiction of this matter under 28 U.S.C. 1257(2).

An additional reason why this case involves no substantial federal question appears from a reading of the Court of Appeals' opinion. The recent history of the setting of tax rates in Arizona which is set out in the opinion of the Court of Appeals suggests that the change in the setting of the tax rate was more a matter of form than of substance. It was simply a division of responsibilities between the Legislature and the Tax Commission for the year 1970, whereas, previously the Tax Commission had handled the

entire task of setting the tax rate by itself. That circumstance and the comparison of surplus carryovers with the preceding years suggests that there probably would not have been any substantial change in the tax rate if the procedure had not been changed in 1970. However, if the tax rate were different because of what happened, Arizona Public Service Company received the benefit of a lower tax rate in the following year because of the surplus carryover. Since Arizona Public Service Company had the full opportunity to be heard and had the claims adjudicated by Arizona courts, its failure to properly allege that the tax rate resulting from the two appropriation items was so excessive as to be fraudulent and arbitrary cannot now

give rise to a violation of procedural due process. Arizona Public Service Company certainly was not deprived of any remedy. There is no due process question in this case. Because of the lack of a substantial federal question, the case should be dismissed. Abrams v. Van Schaick, 293 U.S. 188 (1934).

Moreover, Arizona Public Service Company could have availed itself of the remedy under A.R.S. §§ 35-212 and 35-213.[2/] If these statutes were utilized the net effect of an unconstitutional appropriation would be that

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2/ A.R.S. §35-212. Injunctive and civil remedies.

The attorney general, under appropriate circumstances, shall bring an action in the name of the state to enjoin the illegal payment of state money, or if the money has been paid, to recover such money plus twenty per cent of such amount and interest and costs to be paid into the state treasury to the credit of the fund from which the payment was made.

the taxpayer who successfully challenged the appropriation would have paid his taxes a year earlier than he might otherwise. The sums that the state was enjoined from spending under these statutes or that were recovered would go into the general fund of the state resulting in an increase in the surplus carried over to the next year and a corresponding reduction in next year's tax levy. That remedy is

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2/ cont'd.

A.R.S. §35-213. Failure of attorney general to bring action; action by taxpayer; bond; amount of recovery and attorney fees.

A. If for sixty days after request made by a taxpayer of the state in writing, the attorney general fails to institute an action as provided in § 35-212, any taxpayer of the state may institute the action in his own name and at his own cost with the same effect as if brought by the attorney general.

B. The person instituting the action shall execute a bond payable to the defendant in the action, conditioned that the plaintiff will prosecute the action with diligence and finality or will pay all damages sustained by the defendant by reason of the action and all costs incurred therein.

certainly sufficient to satify the requirements of due process. Procedural due process only requires notice and an opportunity to be heard and Arizona Public Service Company has been accorded that protection under Arizona law. It is submitted here that if Arizona Public Service Company is raising a "substantive" due process challenge, that challenge is totally insubstantial. Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955).

CONCLUSION

On the basis of the points and authorities discussed herein, the appeal should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25 ~~24~~th day of May, 1976, three copies of the MOTION TO DISMISS AND BRIEF IN SUPPORT OF MOTION were mailed postage prepaid to SNELL & WILMER, Esquires, 3100 Valley Bank Center, Phoenix, Arizona 85073, Attorneys for Appellant.

I further certify that all parties required to be served have been served.

BRUCE E. BABBITT
Attorney General

/s/ JAMES D. WINTER
JAMES D. WINTER
Assistant Attorney General

Attorney for Appellees

Subscribed and sworn to before me this 25 ~~24~~th day of May, 1976.

/s/ Leone Hohman
Notary Public

My Commission expires:
3-19-80

reply brief

Supreme Court, U. S.
FILED
JUN 10 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976
No. 75-1569

ARIZONA PUBLIC SERVICE COMPANY, a corporation,
Appellant,

vs.

THE STATE OF ARIZONA; ERNEST A. GARFIELD, STATE TREASURER OF ARIZONA; STATE TAX COMMISSION OF ARIZONA and WALDO DeWITT, JOHN HAZELETT and ROBERT KENNEDY, MEMBERS OF AND CONSTITUTING STATE TAX COMMISSION OF ARIZONA; APACHE COUNTY; LaVERE O. CONNOLLY, TREASURER OF APACHE COUNTY; COCHISE COUNTY; F. C. ALEXANDER, TREASURER OF COCHISE COUNTY; COCONINO COUNTY; ROSE STACY, TREASURER OF COCONINO COUNTY; GILA COUNTY; ROY WOOD, TREASURER OF GILA COUNTY; GRAHAM COUNTY; LOLA HUBBARD, TREASURER OF GRAHAM COUNTY; MARICOPA COUNTY; HAROLD D. LAFFERTY, TREASURER OF MARICOPA COUNTY; MOHAVE COUNTY; RUTH O. MOSER, TREASURER OF MOHAVE COUNTY; NAVAJO COUNTY; RAYMOND H. RANDALL, TREASURER OF NAVAJO COUNTY; PIMA COUNTY; JAMES LEE KIRK, TREASURER OF PIMA COUNTY; YAVAPAI COUNTY; PAUL J. WEDEPOHL, TREASURER OF YAVAPAI COUNTY; YUMA COUNTY; ROBERT E. LEE, TREASURER OF YUMA COUNTY,
Appellees.

On Appeal From Supreme Court of Arizona.

Brief of Appellant Opposing Appellees' Motion to Dismiss.

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THE STATE OF ARIZONA; ERNEST A. GARFIELD, STATE TREASURER OF ARIZONA; STATE TAX COMMISSION OF ARIZONA and WALDO DeWITT, JOHN HAZELETT and ROBERT KENNEDY, MEMBERS OF AND CONSTITUTING STATE TAX COMMISSION OF ARIZONA; APACHE COUNTY; LaVERE O. CONNOLLY, TREASURER OF APACHE COUNTY; COCHISE COUNTY; F. C. ALEXANDER, TREASURER OF COCHISE COUNTY; COCONINO COUNTY; ROSE STACY, TREASURER OF COCONINO COUNTY; GILA COUNTY; ROY WOOD, TREASURER OF GILA COUNTY; GRAHAM COUNTY; LOLA HUBBARD, TREASURER OF GRAHAM COUNTY; MARICOPA COUNTY; HAROLD D. LAFFERTY, TREASURER OF MARICOPA COUNTY; MOHAVE COUNTY; RUTH O. MOSER, TREASURER OF MOHAVE COUNTY; NAVAJO COUNTY; RAYMOND H. RANDALL, TREASURER OF NAVAJO COUNTY; PIMA COUNTY; JAMES LEE KIRK, TREASURER OF PIMA COUNTY; YAVAPAI COUNTY; PAUL J. WEDEPOHL, TREASURER OF YAVAPAI COUNTY; YUMA COUNTY; ROBERT E. LEE, TREASURER OF YUMA COUNTY,
Appellees.

On Appeal From Supreme Court of Arizona.

Brief of Appellant Opposing Appellees' Motion to Dismiss.

This brief of Appellant, Arizona Public Service Company ("APS"), in opposition to the Motion to Dismiss of Appellees (the "State") deals only with

the State's first argument, that the appeal of APS was not timely taken. The State's remaining two arguments do not squarely confront the constitutional issue raised in APS's Jurisdictional Statement, but attempt to gloss over it. As the Jurisdictional Statement shows, the constitutional issue is, and remains, unavoidable and substantial.

On the question of the timeliness of the appeal, the starting point is the general fundamental standard that an appeal may be taken only after a judgment becomes truly final, as to all parties and as to all issues, not merely as to some issue—even though the most important—and not merely as to federal or constitutional issues. *Gospel Army v. Los Angeles,* 331 U.S. 543 (1947); *Chicago G. W. R. Co. v. Basham,* 249 U.S. 164 (1919); *Parr v. United States,* 351 U.S. 513 (1956); *Market Street R. Co. v. Railroad Commission,* 324 U.S. 548 (1945). In the case last cited, this Court set forth this standard as follows:

> "It [the state court judgment] must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."
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> 324 U.S. at 551.

The salutary purposes of this rule, of course, are to avoid piecemeal interference by the Supreme Court with state court proceedings and to refrain from asserting jurisdiction until the controversy in the state court proceedings have been finally resolved. In the present case the state court proceedings were not completely concluded until entry of the judgment of the Superior Court, pursuant to the mandate of the Court of Appeals,

on March 4, 1976. The Notice of Appeal filed by APS on April 14, 1976 was filed well within the 90-day period following March 4.

However, the basic rule that there be total finality of the state court proceedings is subject to two qualifications. One—which is not here relevant—is that in some cases the Supreme Court will permit an earlier appeal, before the state court proceedings have been absolutely exhausted, if there is some practical and compelling justification to do so, such as an issue involving an important national policy which calls for immediate determination by the Supreme Court. *See, e.g., Mills v. Alabama,* 384 U.S. 214 (1966); *Miami Herald Publishing Co. v. Tormillo,* 418 U.S. 241 (1974); *Cox Broadcasting Corporation v. Cohn,* 420 U.S. 469 (1975).

The second qualification *is* a consideration in this case. It is not disputed that the time to take an appeal is considered to begin to run when the last *discretionary* act is performed by a court at the state court level, even though there may follow purely *ministerial* acts before the state court proceedings are technically completely final. *E.g.; Mower v. Fletcher,* 114 U.S. 127 (1885); *Rio Grande W. R. Co. v. Stringham,* 239 U.S. 44 (1915).

Under this second qualification, the action by the Superior Court of Maricopa County in entering final judgment on March 4th was a purely ministerial function. The Superior Court judge had no discretion other than to enter judgment in favor of the state pursuant to the mandate of the Court of Appeals.

What, then, was the last discretionary function performed at the state court level? This last discretionary function was performed on one of two dates, on Feb-

ruary 9, 1976, the date the Court of Appeals actually issued its mandate to the Superior Court, or possibly on the earlier date of January 30, 1976, when the Court of Appeals denied the motion of APS for the mandate of the Court of Appeals to permit APS to amend its complaint. The notice of appeal by APS, filed on April 14, 1976, was filed within 90 days of even this earlier date of January 30, 1976. Therefore, if the Court of Appeals exercised any discretion in passing upon the motion of APS requesting that the mandate to the Superior Court permit amendment of the APS complaint, this appeal was clearly timely.

The Court of Appeals in ruling upon the APS motion ruled adversely to APS, denying the motion. However, there is no question whatever but that the Court of Appeals in its ruling on the motion was not merely acting ministerially. It was exercising its discretionary and judicial function, passing upon a motion which was vigorously asserted and briefed by APS and just as vigorously contested and briefed by the State. That the Court of Appeals had authority, had it chosen, to rule in favor of APS to permit the requested amendment is amply supported by both Arizona and federal case authority, Arizona's Rules of Civil Procedure being substantially the same as the Federal Rules of Civil Procedure. For Arizona cases see *Frank v. Solomon,* 94 Ariz. 55, 381 P.2d 591 (1963); *Cagle v. Karr,* 101 Ariz. 225, 418 P.2d 381 (1966); *Harbel Oil Co. v. Steele,* 1 Ariz.App. 315, 402 P.2d 436 (1965);

and *County of Maricopa v. Chatwin,* 17 Ariz.App. 576, 499 P.2d 190 (1972). For federal cases see, *Sears, Roebuck & Co. v. Marhenke,* 121 F.2d 598 (9th Cir., 1941); *Negrich v. Hohn,* 379 F.2d 213 (3rd Cir., 1967); *Whitelock v. Leatherman,* 460 F.2d 507 (10th Cir., 1972).

It is particularly noteworthy that the *Chatwin* case was an ad valorem tax case in which a taxpayer challenged the correctness of tax classification and raised an issue of unconstitutional discrimination through an action for equitable or declaratory relief. The appellate court held that the complaint should have been dismissed because the taxpayer had an adequate remedy under the procedures of A.R.S. § 42-204 (the very code section in issue in this case). The mandate issued by the Court of Appeals in the *Chatwin* case specifically directed the trial judge to permit amendment of the complaint:

> "Upon remand, the respondent judge is directed to dismiss the original complaint and grant the respondent First National Bank's motion to file an amended complaint stating a claim for refund pursuant to the provisions of A.R.S. § 42-204, sub. sec. C and seeking only the relief provided for in that statute."
>
> 17 Ariz.App. at 584, 499 P.2d at 198.

In this case, the Court of Appeals chose not to authorize the trial court to permit amendment of the complaint, but in so doing it exercised a judgmental, non-ministerial, discretionary function. The time to take

this appeal began to run no earlier than January 30, 1976, the date on which the Court of Appeals denied the APS motion. Notice of appeal was filed within 90 days thereafter and the appeal is, therefore, timely brought before this Court.

Respectfully submitted,

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